IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-127

BLANCHE HARRIS and LEON L. MOORE, JR.,
trading as LEON L. MOORE OIL COMPANY,
Petitioners

V.

ATLANTIC RICHFIELD COMPANY,
Respondent

On Petition for A Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Subject Index

Table of Authorities

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The respondent, Atlantic Richfield Company, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the decision of the United States District Court for the Eastern District of North Carolina granting respondent's motion for summary judgment, which decision was affirmed *per curiam* by the United States Court of Appeals for the Fourth Circuit.

Statement of the Case
Proceedings Below

This action was commenced by petitioners on April 28, 1972. In their initial complaint, petitioners essentially alleged anticipatory breaches of three written contracts which had been entered into in April, 1967. In December, 1974, after Atlantic Richfield Company (hereinafter "Atlantic Richfield") filed answer and counterclaim, petitioners filed a motion to amend the complaint to assert two additional claims; (1) violation of Section 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) and 13(d) and (e) of the Robinson-Patman Act; and (2) violation of the North Carolina Unfair Trade Practices Act, North Carolina General Statute §75-1, *et seq.* By order filed on February 5, 1975, the district court granted petitioners' motion to amend, Atlantic Richfield again answered and counterclaimed. Extensive discovery ensued and was completed.

On February 19, 1976, Atlantic Richfield filed a motion for summary judgment on its counterclaim. On February 22, 1977, Atlantic Richfield filed a

motion for summary judgment on the matters alleged in petitioners amended complaint. On August 5, 1977, the day of the final pretrail conference and hearing on Atlantic Richfield's motion, petitioners filed a reply brief and two affidavits, one by petitioners' attorney and one by the attorney's secretary. Atlantic Richfield filed its responsive brief on August 12, 1977. Beginning on that same day, petitioners parcelled out more affidavits, attaching thereto photocopied and uncertified pages from various publications, clippings and assorted papers.

On March 23, 1978, the district court entered its Memorandum of Decision and Judgment granting both Atlantic Richfield's motion for summary judgment as to the matters alleged in petitioners' amended complaint and its motion for summary judgment on the counterclaim.[1]

Petitioners appealed and the United States Court of Appeals for the Fourth Circuit affirmed *per curiam* on March 23, 1979.

Statement of Facts

This action arose out of the decision by Atlantic Richfield, in May 1971, to withdraw from marketing

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[1]Atlantic Richfield's counterclaim was based upon petroleum products sold and delivered to but not paid for by petitioners. Petitioners have not appealed from the district court's entry of judgment in favor of Atlantic Richfield on its counterclaim in the amount of $184,396.97 plus interest.

operations in the Southeast United States. When the decision was announced, Atlantic Richfield and petitioners were parties to three written agreements, which had been entered into in April 1967, under which petitioners were designated the exclusive distributor of Atlantic products in a specific territory and Atlantic Richfield agreed to supply and petitioners agreed to purchase certain amounts of gasoline, fuel oil and automotive lubricants. Each of the three agreements was to run for fifteen years.

In 1967, Atlantic Richfield's market position in North Carolina and the Southeast was weak. In 1968, Atlantic Richfield attempted to improve its market share by merging with Sinclair Oil Corporation. However, in January 1969, the United States Department of Justice filed suit against Atlantic Richfield and Sinclair to block the proposed merger, and obtained an injunction which preliminarily enjoined the merger. Subsequently Atlantic Richfield was allowed to proceed with the merger only upon compliance with an Order that it dispose of Sinclair's properties in the Southeast. By this decree, Atlantic Richfield was compelled to abandon the only effective, feasible method it had for increasing its market share and profitability in the region. After conducting a comprehensive retail market study in 1970, Atlantic Richfield concluded that its market share and profit position in the Southeast were unsatisfactory and could not be improved. In May of 1971, Atlantic Richfield announced that it was withdrawing from marketing operations in the Southeast United States. Atlantic Richfield's decision to withdraw was

unilateral, made in good faith, and based upon sound business reasons.

Following the announcement of its intended withdrawal Atlantic Richfield continued to honor its contractual obligations to petitioners. Subject to certain regulations of the Federal Energy Administration, (now the Department of Energy), Atlantic Richfield continued to supply petroleum products to petitioners in accordance with its three contracts and continued to comply with the credit card requirements of the contracts.[2]

Argument

(A) NO IMPORTANT FEDERAL OR PUBLIC QUESTION, CONFLICT WITH THE DECISIONS OF THIS COURT OR CONFLICT WITH STATE LAW IS INVOLVED HERE.

The Petition merely attempts to obtain a further review of the district court's determination, affirmed *per curiam*, that petitioners failed to establish the

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[2]Atlantic Richfield continued to honor its contractual obligations to petitioners until August 1978, when the Department of Energy, at petitioners' request, approved petitioners' application to terminate their relationship with Atlantic Richfield and to be supplied by Cities Service.

existence of a genuine issue of material fact in order to withstand Atlantic Richfield's motion for summary judgment. No important federal or public question is involved. Nor is there any conflict with any decision of this Court. In each of this Court's decisions cited by petitioners at pages 9 and 10 of the Petition, there was a finding of significant probative evidence to support the alleged antitrust conspiracy. However, petitioners presented no such evidence in this case. See discussion, *infra* at pages 9 to 11.

The decision of the district court is also not in conflict with state law. Every federal court decision on point has applied North Carolina's one year statute of limitations, as set forth in N.C. Gen. Stat. §1-54 to the North Carolina Unfair Trade Practices Act, N.C. Gen. Stat. §75-1.1 *et seq. North Carolina Theatres, Inc. v. Thompson*, 277 F.2d 673, 676 (4th Cir. 1960); *Thomas v. Petro-Wash, Inc.* 429 F.Supp. 808, 813 (M.D.N.C. 1977); and *CF Industries v. Transcontinental Gas Pipeline*, 448 F.Supp. 475, 486 (W.D.N.C. 1978). There is no decision of the Supreme Court of North Carolina applying any statute of limitations to a Chapter 75 claim. The court's dictum in *State ex rel Edmisten v. J.C. Penny Co.*, 292 N.C. 311, 233 S.E. 2d 895 (1977) quoted at page 11 of the petition, did not address the application of any state statute of limitations to a Chapter 75 claim. In any event, petitioners failed to present any evidence of a violation of Chapter 75 by Atlantic Richfield.

(B) THE DISTRICT COURT DID NOT ERR IN GRANTING ATLANTIC RICHFIELD'S MOTION FOR SUMMARY JUDGMENT.

(1) There are no genuine issues of material fact tending to establish a breach of any contract by Atlantic Richfield

In their amended complaint, petitioners alleged that Atlantic Richfield breached three written agreements for the sale of petroleum products by (1) eliminating all credit card sales, (2) closing the Wilmington, North Carolina, distribution facility, and (3) announcing its withdrawal from the Southeast in 1971.

With respect to the credit card question, there was no genuine issue of material fact with respect to Atlantic Richfield's compliance with the contract requirements. The agreement provided that Atlantic Richfield would accept petitioners' assignments of retail credit sales. Atlantic Richfield produced sworn evidence that it had continued to do so and petitioners produced no counter affidavits. Indeed, petitioner Blanche Harris testified that if anyone wanted to use a credit card at any one of petitioners' stations, they could. Thus, the district court properly concluded that Atlantic Richfield had complied with its contract requirements regarding credit cards.

Petitioners' arguments with respect to the announcement of cessation of marketing operations in the

Southeast and the closing of Atlantic Richfield's Wilmington distribution facility are equally unavailing. The 1971 announcement of intended withdrawal was not disputed nor did Atlantic Richfield dispute that in 1973 it closed its Wilmington distribution facility. However, the written contracts contained no terms or conditions which required Atlantic Richfield to continue to do business in the Southeast United States or maintain any distribution facility in Wilmington, North Carolina. The contracts only required that Atlantic Richfield sell to petitioners the gallons of petroleum products called for in the agreements. This was consistently done until petitioners voluntarily changed sources of supply in August of 1978. Thus, there are no facts, disputed or undisputed, establishing a breach of contract by Atlantic Richfield.

(2) There is no genuine issue of material fact tending to establish that Atlantic Richfield violated Section 1 of the Sherman Act.

Petitioners' entire allegation on the antitrust claim, set forth in Paragraph 23 of the amended complaint, reads as follows:

> That the Plaintiffs are informed and believe that the action of the Defendant in withdrawing from the southeastern states and ceasing to do business therein was taken for the purpose of dividing the market for petroleum products in order to reduce

> competition and raise prices, and constitutes a violation of Title 15, United States Code, § 1, 2 and 13(d) and (e).
>
> Amended Complaint,
> Paragraph 23

Although the district court indicated that petitioners had failed to state a claim for violation of Section 1 of the Sherman Act in their pleadings, the Court chose to ground its decision on Atlantic Richfield's motion for summary judgment.[3]

At their depositions, petitioners conceded that they had no personal knowledge of any agreement or conspiracy between Atlantic Richfield and any other party. In addition, Atlantic Richfield produced affidavit testimony denying any alleged conspiracy and detailing its independent business reasons for withdrawing from the southeast states. The burden thus shifted to petitioners to produce "significant probative evidence" of a conspiracy in violation of Section 1 of the Sherman Act. *E.g., First National Bank of Arizona v. Cities Service* 391 U.S. 253, 289, 88 S.Ct. 1575, 1592-93, 20 L.Ed.2d. 569, 593 (1968); *Aviation Specialties, Inc. v. United Technologies Corp.*, 568 F.2d 1186, 1192 (5th Cir. 1978); *Scranton Construction Company, Inc. v. Litton Industries Leasing Corp.*, 494 F.2d 778, 782 (5th Cir. 1974).

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[3]The petitioners have abandoned their claims under the Robinson-Patman Act and Section 2 of the Sherman Act.

Petitioners failed to fulfill that obligation.

Petitioners argue that the transcript of an appearance by a former federal official before a House of Representatives subcommittee, an uncertified copy of a preliminary staff report of the Federal Trade Commission ostensibly prepared for a Senate subcommittee and an opinion of an assistant professor at Duke University constitute significant probative evidence to justify denial of Atlantic Richfield's motion for summary judgment on the antitrust claim. This material does not constitute significant probative evidence of any conspiracy. Federal Rule of Civil Procedure 56(e) requires opposing affidavits to be made on personal knowledge, to set forth affirmatively the affiant's competency to testify to the matters stated, and to set forth facts which should be admissable in evidence. Documents attached to affidavits must be sworn to or certified. The transcript of John W. Wilson's testimony before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary of the United States House of Representatives and the preliminary staff report of the Federal Trade Commission were clearly inadmissable. The fact that they were attached to affidavits of petitioners' counsel does not satisfy the requirements of Rule 56(e). See, *e.g., United States v. Dibble,* 429 F.2d 598, 602 (9th Cir. 1970); *Antonio v. Barnes,* 464 F.2d 584 (4th Cir. 1972); *Monroe v. Board of Education of Town of Wolcott, Conn.*, 65 F.R.D. 641 (D. Conn. 1975); *Henkin v. Rockower Bros., Inc.*, 259 F. Supp.

202 (S.D.N.Y. 1966); *Hotel and Restaurant Employees' Alliance, Etc. v. Allegheny Hotel Co.*, 374 F.Supp. 1259, 1263 (W.D. Pa. 1974); and *Walpert v. Bart*, 280 F.Supp. 1006, 1010 (D. Md. 1967), aff'd., 390 F.2d 877 (4th Cir. 1968).

Petitioners' tactic of trying to salvage their antitrust case by relying on an opinion which is based solely on speculation and hypothesis and is unsupported by evidence in the record is not a new one. In *Merit Motors, Inc. v. Chrysler Corporation*, 569 F.2d 666, 672-673 (D.C. Cir. 1977), the Court held that to withhold summary judgment against a party who relies solely on an expert's opinion that has no more basis in or out of the record than theoretical speculation would seriously undermine the policies of Rule 56 of the Federal Rules of Civil Procedure. The Court stated: "We are unwilling to impose the fruitless expenses of litigation that would result from such a limitation on the power of a court to grant summary judgment." 569 F.2d, *supra*, at 673. The affidavit of Dr. James Scheiner relied upon by petitioners is incompetent and speculative. As appears from the affidavit itself, Dr. Scheiner's roundhouse and conclusory opinions are not based upon personal knowledge but on what he perceives to be but does not specify as the history, business associations and reputations of the major oil companies. Dr. Scheiner's affidavit illustrates the petitioners' total failure to produce any probative evidence of the alleged conspiracy. Dr. Scheiner was identified to defendant in Plaintiff's Answers to Interrogatories, Plaintiff's Supplemental Answers to Interrogatories, and in two "Pretrial Statements" filed by plaintiff

as an expert witness *on damages only.* He was deposed as such during the discovery period. Only after Atlantic Richfield's motion for summary judgment was argued and all briefs filed did petitioners proffer Dr. Scheiner's opinion in a futile effort to avoid summary judgment.

(C) PETITIONERS' ASSERTION THAT THE DISTRICT COURT DID NOT READ THE MATERIALS SUBMITTED ON THEIR BEHALF IS PATENTLY FALSE.

The weakness of petitioners' case is further demonstrated by their unjustifiable attack on the integrity of the district court. Petitioners assert that there has been a departure from the accepted and usual course of judicial proceedings in that they "infer" that the district court did not read the material submitted on their behalf in opposition to Atlantic Richfield's motion for summary judgment. Petitioners assert:

> The trail Court stated that the antitrust material submitted by the petitioners in opposition to the respondent's summary judgment motion were read ". . . as time has permitted . . ." From this statement, and from the trial Court's erroneous statements regarding the substance of the evidence in the record, an inference arises that the Court did not read or consider the material submitted in opposition to Atlantic's summary judgment motion.

> In this posture, the case stands for the proposition that if a court has not the time to read the materials the plaintiff must lose.
>
> (Pet. P. 10)

The district court held:

> Defendant's summary judgment motion came on for hearing on August 5, 1977, at which time the court accepted for filing the plaintiffs' response defendant's motion *notwithstanding it was then more than four months overdue under the rules of the court.* The defendant was allowed time in which to file a reply memorandum which it promptly did, *but in the weeks that followed the court was inundated with a half dozen or more new affidavits to which there were attached hundreds of pages of printed materials, charts, correspondence, etc., which the court was asked to consider in connection with plaintiffs' opposition to defendant's motion for summary judgment. Although under no obligation to do so, the court has, as time has permitted, read and considered this voluminous material,* the massive record previously compiled through discovery and the case authorities and legal arguments submitted by counsel, and the motion can now be decided. (Emphasis supplied.)
>
> (Pet. App. B 2)

To infer that the district court did not read the materials submitted by petitioners when the opinion specifically states that the materials had been read (despite the repeated failure of petitioners' counsel to comply with the local rules) does the district court a grave injustice.

Conclusion

Petitioners had unlimited discovery to develop their case. Despite the compilation of a massive record, petitioners were unable to come forward with any evidence to support the allegations in their amended complaint. They should not be permitted "to get to a jury on the basis of the allegations in their complaint, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations . . . . " *First National Bank of Arizona v. Cities Service*, 391 U.S. 253, 290, 88 S. Ct. 1575, 1593, 20 L. Ed. 2d 569 (1968).

No issue of any importance warrants review by this Court and, therefore, the petition for certiorari should be denied.

Respectfully submitted,

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